MOTION FILED
MAR 15 2017
:CORD
AND
RIEF.

Nos. 16-992

IN THE
SUPREME COURT OF THE UNITED STATES

MARISA N. PAVAN, ET AL.,
Petitioners,

v.

NATHANIEL SMITH,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* FAMILY LAW PROFESSORS IN SUPPORT OF PETITIONERS AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE

Amici curiae—54 family law professors—respectfully move for leave to file an *amici curiae* brief in support of petitioners under Rule 37.2(b). *Amici curiae* are family law professors with substantial knowledge of state family laws concerning birth certificates, marriage, and parentage, as well as the harms that can result when a parent is not named on a birth certificate. *Amici curiae* request permission to file a brief explaining how Arkansas's refusal to place same-sex spouses on their children's birth certificate is inconsistent with the rules governing birth certificates.

In accordance with Rule 37.2(a), *amici curiae* notified Petitioner of *amici curiae*'s intent to file this brief more than 10 days before the due date, and petitioner granted consent. *Amici curiae* have submitted a copy of this consent to the court as proof of consent.

Respondent also received notice of intent to file more than 10 days before the due date per Rule 37.2(a). However, Respondent did not grant consent. Respondent instead informed counsel for *amici curiae* that, according to its policy, respondent will only provide consent after seeing a copy of a brief in advance. This request was not feasible with *amici curiae*'s drafting and research schedule. Accordingly, counsel for *amici curiae* informed respondent that it would file a motion for leave to file this brief, as provided for under Rule 37.2(b). Respondent stated it would "take no position" with regard to this motion

for leave to file rather than opposing this motion for leave to file.

Amici curiae family law professors therefore respectfully request that the court grant their unopposed motion to file their *amici curiae* brief.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

Amici curiae – 54 family law professors – respectfully submit this brief in support of Marisa N. Pavan, et al.'s petition for a writ of certiorari. *Amici* are law professors with a significant focus on family law.[2] *Amici* have substantial knowledge of, and experience with, the state family laws that address marriage, parentage, and birth certificates, as well as the harms that parents and their children confront when they are denied legally accurate birth certificates. This brief explains that Arkansas's refusal to place same-sex spouses on their children's birth certificates is inconsistent with the rules governing birth certificates. This brief also describes how this unequal and discriminatory treatment harms the security, stability, and dignity of same-sex parent families.

SUMMARY OF ARGUMENT

In *Obergefell v. Hodges*, this Court held that same-sex couples could not be excluded from the

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[1] Pursuant to Rule 37.6, amici curiae certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. Petitioners' consent has been filed with the Clerk with this brief. As explained in the accompanying motion, Respondent received timely notice of intent to file but did not provide consent.

[2] Amici professors are listed in Appendix.. Their institutional affiliations are listed for identification purposes only.

institution of marriage or the "constellation of benefits that the States have linked to marriage." 135 S. Ct 2584, 2601 (2015). Nonetheless, the Arkansas Supreme Court has denied same-sex spouses the right to have both of them included on the birth certificate of their child, even though different-sex spouses in the same position would be placed on the birth certificate as a matter of course. This holding flouts this Court's rulings in *Obergefell* and *United States v. Windsor*, 133 S. Ct. 2675 (2013), subjects these families to unequal treatment, and threatens the dignity and stability of the families of same-sex couples.

Birth certificates are legal documents that record a child's date and place of birth, as well as the names of the child and the parents. Under the laws of Arkansas and other states, husbands are placed on the birth certificate of a child born to their wives without any proof of biological connection to the child, even when the child is conceived from artificial insemination and there is indisputably no biological connection between the husband and the child. Arkansas is refusing to apply these rules equally to married same-sex couples.

As a result of Arkansas' discriminatory application of its rule, same-sex families are denied critical tangible protections and are stigmatized when state officials refuse to list both same-sex spouses on their child's birth certificate. As discussed below, some of these tangible and intangible harms were demonstrated to the Court two terms ago by the anguishing experiences of some of the plaintiffs in *Obergefell*. Birth certificates

provide security to families because they are universally accepted and commonly required as proof of parentage. Parents rely on birth certificates to prove to hospitals and health-care providers that they have the right to make health-care decisions for their children, to enroll their children in school and childcare, and to travel internationally with them. Birth certificates are important in a host of other extraordinary, as well as ordinary, moments in life.

The Arkansas Supreme Court's opinion defies this Court's decisions in *Obergefell* and *Windsor* and therefore warrants certiorari.

REASONS FOR GRANTING THE WRIT

I. BIRTH CERTIFICATES ARE RECORDS OF LEGAL PARENTAGE.

A birth certificate is "the only common governmentally-conferred, uniformly recognized, readily-accepted record that establishes identity, parentage, and citizenship, and it is required in an array of legal contexts." *Henry v. Himes*, 14 F. Supp. 3d 1036, 1050 (S.D. Ohio), *aff'd sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The primary purpose of a birth certificate is to document a child's *legal* parentage, date and place of birth, and citizenship. *See, e.g., Henry*, 14 F. Supp. 3d at 1052 ("An Ohio birth certificate is a legal document, not a medical record."); *see also Raftopol v. Ramey*, 12 A.3d 783, 793 (Conn. 2011) ("A birth certificate is a vital record that must accurately reflect *legal* relationships between parents and children") (emphasis added). And, indeed, as the discussion

below demonstrates, that is how they are used; birth certificates are relied upon by a range of state, federal, and international officials as evidence of legal parentage even far beyond the borders of the state that issues them.

A child's legal parents are often also the biological parents, but sometimes they are not. In Arkansas, as in all other states, there are a variety of circumstances in which people who are not biological parents must be named on a child's birth certificate. For example, Arkansas law ***requires*** that a husband be listed on the birth certificate. Arkansas Code § 20-18-401(f)(1) ("[I]f the mother was married at the time of either conception or birth or between conception and birth the name of the husband shall be entered on the certificate as the father of the child."). This is consistent with the birth certificate rules in other states. *See, e.g.*, Model Vital Statistics Act § 11(h) ("If the mother was married at the time of either conception or live birth, or between conception and live birth, the name of the husband [spouse] shall be entered on the report as the (father, parent) of the child, unless parentage has been determined otherwise by a court of competent jurisdiction.") (Brackets in original.)

Husbands must not only be named on the birth certificate of a child born to their wives; they cannot be removed from that birth certificate except in very limited circumstances. Undisputed evidence of a husband's lack of biological parentage is ***not sufficient***; the husband's name can be removed from the birth certificate only if there is a court order establishing someone else's paternity, or the wife,

husband, ***and*** putative father have signed affidavits attesting to the paternity of the putative father. *Id.*

These birth certificate rules are based on and reflect the universal rules governing the parentage of children born to married couples in the United States. In Arkansas, and every other state, a husband is ***presumed*** to be the legal parent of his wife's child without proof of a genetic connection. *See* Ark Code § 20-18-401(f)(1)(A) and (B). *See also* Leslie Harris, Lee E. Teitelbaum, June R. Carbone, Family Law 865 (Aspen Publishers, 5th ed. 2014) ("In all states a child born to a married woman is at least rebuttably presumed to be the child of her husband."). The unanimity of state law on this issue derives from deep common law roots. *See Michael H. v. Gerald D.*, 491 U.S. 110, 124-25 (1989) ("The presumption of legitimacy was a fundamental principle of the common law. ... The primary policy rationale underlying the common law's severe restrictions on rebuttal of the [marital] presumption appears to have been an aversion to declaring children illegitimate .... A secondary policy concern was the interest in promoting the 'peace and tranquility of States and families.'"). (Citation omitted). Moreover, under Arkansas law, a husband's presumed parentage cannot be rebutted even when a child's biological father has been identified and is interested in being adjudicated the legal father, unless a court finds that "rebutting that presumption is in the best interest of a child." *R.N. v J.M.*, 61 S.W.3d 149, 155 (Ark. 2001).

In addition to the general marital presumption, almost all states also expressly confer

legal parentage on a spouse who consents to the use of assisted reproductive technologies such as in vitro fertilization or donor insemination.[3] Arkansas, again, is one of those states. *See, e.g.*, Ark. Code Ann. § 9-10-201(a) ("Any child born to a married woman by means of artificial insemination shall be

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[3] *See, e.g.*, Ala. Code § 26-17-702 (2017); Alaska Stat. Ann.§ 25.20.045 (2017); Ariz. Rev. Stat. Ann. § 25-501(B) (2016); Ark. Code Ann.§ 9-10-201(a) (2017); Cal. Fam. Code § 7613(a) (2017); Colo. Rev. Stat. Ann. § 19-4-106(1) (2016); Conn. Gen Stat. Ann. § 45a-774 (2016); D.C. Code § 16-909(e)(1) (2017); Del. Code Ann. tit. 13, § 8-703 (2017); Fla. Stat. Ann. § 742.11 (2017); Ga. Code Ann.§ 19-7-21 (2016); Idaho Code Ann. § 39-5405(3) (2017); 750 Ill. Comp. Stat.40/3(a) (2016); La. Civ. Code Ann. art.188 (2017); Md. Code Ann., Est. & Trusts § 1-206(b) (2017); Me. Rev. Stat. tit. 19-A, § 1923 (2017); Mass. G. L. c. 46, §4B (2016); Mich. Comp. Laws Ann. § 333.2824(6) (2016); Minn. Stat. Ann. § 257.56(1) (2016); Mo. Ann. Stat. § 210.824(a) (2017); Mont. Code Ann. § 40- 6-106(1) (2017); Nev. Rev. Stat. Ann. § 126.670 (2016); N.C. Gen. Stat. Ann. § 49A-1 (2017); N.D. Cent. Code Ann. § 14-20-61 (703) (2016); N.H. Rev. Stat. Ann. § 168-B:2(II) (2016); N.J. Stat. Ann. § 9:17- 44(a) (2017); N.M. Stat. Ann. § 40-11A-703 (2016); N.Y. Dom. Rel. Law § 73(1) (2015); Ohio Rev. Code Ann. § 3111.95(A) (2016); Okla. Stat. Ann. tit. 10, § 552 (2016); Or. Rev. Stat. § 109.243 (2016) (held unconstitutional as applied to same-sex couples who could not then legally marry in *Shineovich v. Shineovich*, 229 Or. App. 670, 686 (Ct. App. 2009); *see In re Registered Domestic P'ship of Madrone*, 271 Or. App. 116, 350 P.3d 495 (Ct. App. 2015) (extending marital presumption to same sex partner who would have married if the choice had been available); Tenn. Code Ann. § 68-3-306 (2016); Tex. Fam. Code Ann. § 160.703 (2016); Utah Code Ann. § 78B- 15-703 (2016); Va. Code Ann. § 20-158(A)(2) (2017); Wash. Rev. Code § 26.26.710 (2016); Wis. Stat.§ 891.40(1) (2017); and Wyo. Stat. Ann. § 14-2-903 (2016). *See also* Model Vital Statistics Act § 11(h); Uniform Parentage Act §§ 702-703 (2002).

deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination."). In Arkansas, as in other states, a husband who consents to his wife's insemination is a legal parent and is listed on their child's birth certificate, even when all parties know he is not the child's biological parent. Arkansas Code § 20-18-401(f)(1).

Parents adopting children are also named on birth certificates even though those parents share no biological connection with their adopted child. Consistent with the law and practice in all states, upon adoption of a child, Arkansas issues a revised birth certificate with the names of the adoptive parents entered as the child's parents. Ark. Code § 20-18-406(a)(1). The new birth certificate is indistinguishable from the child's original certificate and does not flag the absence of biological connection to the adoptive parent or parents. Code Ark. R. 007.12.5-5.5(a).

In short, a birth certificate, in Arkansas as in other states, is a record of legal parentage.

II. ARKANSAS REFUSAL TO GRANT BIRTH CERTIFICATES ON EQUAL TERMS TO MARRIED SAME-SEX COUPLES INFLICTS HARM ON THOSE COUPLES AND THEIR CHILDREN.

Birth certificates are among the most important and universally recognized items in the "constellation of benefits that the States have linked to marriage." *Obergefell*, 135 S. Ct 2584, 2601

(2015). A birth certificate affirms the family's integrity in the face of doubt, provides ready access to other legal protections, and allows engagement in many ordinary transactions where parent-child status is of concern. Arkansas's refusal to provide this documentation on an equal basis to all married parents thrusts children of married same-sex couples into a second-class status and denies these families tangible protections as well as the dignity to which they are entitled.

Children who lack a birth certificate reflecting their legal parents "suffer the significant material costs ... relegated through no fault of their own to a more difficult and uncertain family life." *See Obergefell*, 135 S. Ct. 2584. Birth certificates are treated nearly universally as the critical evidence of the legal parent-child relationship. As one of the district courts affirmed in *Obergefell* explained:

> Identification on the child's birth certificate is the basic currency by which parents can freely exercise ... protected parental rights and responsibilities. It is also the only common governmentally-conferred, uniformly-recognized, readily-accepted record that establishes identity .... The inability to obtain an accurate birth certificate saddles the child with the life-long disability of a government identity document that does not reflect the child's parentage and burdens the ability of the child's parents to exercise

> their parental rights and responsibilities.

Henry v. Himes, 14 F. Supp. 3d 1036, 1050 (S.D. Ohio 2014), *aff'd sub nom Obergefell*, 135 S. Ct. 2584.

A. Medical Decisions

Medical emergencies underscore the risk families face when they lack birth certificates accurately reflecting their child's legal parentage. In these heart-wrenching situations, a child's life and health may depend upon a parent's ability to make quick decisions on the child's behalf. However, medical providers may insist on seeing a birth certificate to verify a parent's right to make decisions or to have any involvement in a child's medical care. *See, e.g.*, *Tanco v. Haslam*, 7 F. Supp. 3d 759, 764 (M.D. Tenn. 2014) *aff'd sub nom Obergefell*, 135 S. Ct. 2584 (describing how [the non-biological parent] had been deprived of "the right to ... make medical decisions regarding the medical care provided to their baby in the event that [the biological parent was] unable to make those decisions."); *see also* Petitioner's Brief at 10, *Obergefell*, 135 S. Ct. 2584 (2015).

This harm is not hypothetical. In several earlier cases, lesbian and gay parents had a difficult time taking care of their ill children because they were not accurately listed on their children's birth certificates. In one case, the omission of a parent from the birth certificate increased the anguish that the family faced upon the hospitalization of their

infant. Because one spouse was not listed on the child's birth certificate, the parents

> feared that [the spouse] would not be able to authorize emergency medical care if it became necessary. [The birth mother] had to miss a great deal of work she would not otherwise have had to miss. This situation caused additional stress and anxiety to [the parents], which would not have been necessary had [the spouse] been on the child's birth certificate.

Ruling on Petition for Judicial Review, *Gartner v. Iowa, Case* No.: CE 67807 (5th Jud. District of Iowa, Jan 4. 2012), *aff'd Gartner v. Iowa Dep't of Public Health*, 830 N.W.2d 335, 341-42 (Iowa 2013).[4] In another case, same-sex parents who did not have a birth certificate reflecting their child's parentage were "told by both an ambulance crew and emergency room personnel that only 'the mother' could accompany [the child] and thus initially faced a barrier to being with their child in a medical emergency." *Finstuen v. Crutcher*, 496 F.3d 1139, 1142, 1145 (10th Cir. 2007).

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[4] While in some states the biological mother could have authorized her spouse to make decisions on her behalf, that is not a burden shouldered by other couples who are provided with legally accurate birth certificates. In any event, such advance authorization may not be an option in emergencies.

B. Disability and Survivorship Benefits

If a parent is not listed on her child's birth certificate, it is much harder for that child to receive benefits under an array of laws protecting children in the event of parental death or disability.[5] The Social Security Administration ("SSA") requires that parents provide a child's birth certificate when applying for these benefits.[6] SSA also requires parents to produce a birth certificate before claiming their child as a dependent on a parent's Social Security retirement benefits.[7]

The U.S. Department of Veteran Affairs ("VA") likewise requires a birth certificate or comparable document to process claims when a veteran parent has died.[8] In a guidance document

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[5] *See* Social Security Administration, Benefits for Children (March 2016), *available at* https://www.ssa.gov/pubs/EN-05-10085.pdf ("Those dollars help to provide the necessities of life for family members and help make it possible for those children to complete high school. When a parent becomes disabled or dies, Social Security benefits help stabilize the family's financial future.").

[6] *Id.* (requiring "the child's birth certificate and the parent's and child's Social Security numbers.").

[7] *See* Social Security Administration, Retirement Benefits at 11 (January 2017), available at https://www.ssa.gov/pubs/EN-05-10035.pdf.

[8] *See Introduction*, U.S. Department of Veterans Affairs, *available at* https://www.va.gov/opa/publications/benefits_book/benefits_introduction.asp.

explaining how the VA would comply with this Court's decision in *Obergefell*, the VA reiterated that it would require couples to provide a birth certificate or judicial decree[9] to establish parentage when applying for benefits.[10]

The burden shouldered by families who lack a legally accurate birth certificate does not end with federal benefits. Birth certificates are typically required to claim a variety of state disability, unemployment, and survivorship benefits. To give just one example, states, including Arkansas, require a birth certificate as evidence of parentage for a child seeking certain public employee survivorship benefits. *See, e.g.*, Ark Code § 24-12-117(b).

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[9] A court decree of parentage or adoption is not an adequate substitute for a legally accurate birth certificate as a simple, readily available document that proves parentage. Adoption is a burdensome and expensive process that requires judicial approval. For many married same-sex couples – especially poorer ones – these additional costs and procedures may be an insurmountable barrier to obtaining access to benefits for their children. When a child is born to a married different-sex couple the parents are not required to shoulder these additional burdens for their parentage to be acknowledged in a legal document.

[10] *See Important Information on Marriage*, U.S. Department of Governmental Affairs, https://www.va.gov/opa/marriage/ (visited March 5, 2017).

C. Education

Evidence establishing a legal parent-child relationship is critical in the context of education as well as a variety of other programs ranging from after-school care to sports clubs. Parents must verify their parentage in order to register their child for school or daycare. And, critically, many schools rely on birth certificates as evidence of parentage. In Arkansas, for example, a birth certificate is required for a parent to enroll their child in certain school systems absent a court order.[11]

A parent not listed on her child's birth certificate will also face difficulties overseeing and staying updated on her child's education. One of the cases affirmed in *Obergefell* provides an example. There, one parent in a married same-sex couple was forced to execute a general power of attorney in favor of the other, who was not listed on the birth certificate, to enable the other parent to speak with their son's teacher and daycare workers. Brief of Appellant-Petitioner at 10, *Obergefell v. Hodges*, No. 14-556, 2015 U.S. S. Ct. Briefs LEXIS 806.

D. Identity

Families who lack legally accurate birth certificates will also face difficulties ensuring that

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[11] *See, e.g.*, Bentonville Public Schools, *Student Services Enrollment-Information*, https://bentonvillek12.org/web/parents/enrollment.asp (requiring a birth certificate for enrollment).

their children's other identity documents reflect and authorize the roles of both parents in the children's lives. SSA recommends that parents apply for their child's social security number as soon as possible after the child's birth.[12] Families who are unable to do so face a far more burdensome process.[13]

Two of the married plaintiffs in a recent Indiana case involving birth certificates conceived a daughter through artificial insemination. *Henderson v. Adams*, No. 1:15-cv-00220-TWP-MJD, 2016 U.S. Dist. LEXIS 180220, at *7-8 (S.D. Ind. Dec. 30, 2016) (appeal filed). The two mothers provided the information requested on the Indiana Birth Worksheet and listed their child's name as a hyphenated version of both of their last names. *Id.* at 8. Nonetheless, they were issued a birth certificate that listed only the birth mother and her last name. *Id.* Shortly thereafter, the parents received a new social security card that did not include the hyphenated name. *Id.*

The adverse financial and emotional consequences for the family were substantial. As the district court explained:

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[12] *See* Social Security Administration, Social Security Numbers for Children, https://www.ssa.gov/pubs/EN-05-10023.pdf (visited March 4, 2017) ("The easiest time to [apply] is when you give information for your child's birth certificate while you're still at the hospital. If you wait to apply for a number at a Social Security office, there may be delays while we verify your child's birth certificate.")

[13] *Id.*

> Because of this incident, [the unnamed parent] sought a stepparent adoption, which required her to undergo fingerprinting and a criminal background check in addition to submitting her driving record, her financial profile, and the veterinary records for any pet living in the home. A home study was required, which examines the relationship history of [the parents], requires them to write an autobiography and to discuss their parenting philosophy, and requires them to open their home for inspection. The cost ... was approximately $4,200.00. This same costly and time-consuming adoption process is not required of opposite-sex married couples who artificially conceive a child. Instead, the non-biological father who is married to the birth mother is listed on the birth certificate and recognized as the child's father.

Id. at *8-9.

E. Travel

Travel poses another set of difficulties for families who lack a correct birth certificate. Parents must submit legal proof of parental relationship, such as a birth certificate or a judicial decree, to

obtain a United States passport for their child.[14] One of the *Obergefell* couples encountered difficulties with the passport system. Because the parent who was not the birth mother was not named on the birth certificate, she was denied the right to apply for the child's passport. *See* Petitioner's Brief at 10, *Obergefell*, 135 S. Ct. 2584 (2015).

A parent not named on her child's birth certificate may also be stopped at the border when traveling internationally with the child. To prevent kidnappings, some countries require a single parent travelling with a child to produce proof of the parent's relationship with the child.[15] The State Department has issued a warning suggesting that parents travelling with their child carry documentation of their relationship.[16]

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[14] *See Children Under 16*, U.S. Dept. of State, U.S. Passports and Int'l Travel, https://travel.state.gov/content/passports/en/passports/under-16.html (visited March 4, 2017).

[15] *See, e.g., Minor Children traveling to Canada*, Government of Canada, http://www.cic.gc.ca/english/visit/minors.asp, (visited March 5, 2017) ("The parent should present: the child's passport a copy of the child's birth certificate, and a letter of authorization ... which is signed by the parent who is not travelling with them").

[16] *See Children – Child Traveling With One Parent or Someone Who is Not a Parent or Legal Guardian or a Group*, U.S. Customs & Border Protection https://help.cbp.gov/app/answers/detail/a_id/268/~/children---child-traveling-with-one-parent-or-someone-who-is-not-a-parent-or (visited March 4, 3017).

F. Dignity of the Parent-Child Bond

Arkansas's refusal to grant birth certificates recognizing the legal parentage of married same-sex couples "results in more than just material burdens." *See Obergefell*, 135 S. Ct. at 2601. It also burdens the dignity of the parent-child relationship.

A birth certificate "giv[es] recognition and legal structure to" the parent-child relationship, just as a marriage certificate does for a spousal relationship. *See id* at 2600. A birth certificate serves as a badge of "the integrity and closeness of [the] family and its concord with other families ...." *See id., quoting United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013). Access to a legally accurate birth certificate recognizing the child's family relationship also "affords the permanency and stability important to children's best interests." *See Obergefell*, 135 S. Ct. at 2600. It offers children "recognition, stability, and predictability." Without it, "children suffer the stigma of knowing their families are somehow lesser." *Id.* In short, Arkansas's refusal to provide birth certificates on equal terms to the children of married same-sex couples serves to "harm and humiliate" those children and their families. *Id.* at 2600-01.

III. THE COURT SHOULD GRANT CERTIORARI TO ENSURE THAT THE LOWER COURTS DO NOT FLOUT THIS COURT'S RULINGS IN *OBERGEFELL AND WINDSOR*.

Arkansas's birth certificate law provides benefits and recognition to children of married different-sex parents that the Arkansas Supreme Court has now withheld from married same-sex parents. The ruling below, acknowledging the rights of one class of married couples while denying those same rights to another, flouts this Court's rulings in *Obergefell* and *Windsor* and violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment. By providing married different-sex couples birth certificates for their children that reflect the marital presumption of parentage and name both spouses as parents, while denying such documentation to married same-sex couples, Arkansas denies the same-sex parents and their children the security, stability, recognition, and dignity that birth certificates signify and provide.

In *Obergefell*, this Court ruled that "principles of liberty and equality" compelled the conclusion that same-sex couples may marry "on the same terms and conditions as opposite-sex couples," *id.* at 2604, with the same access to the myriad "governmental rights, benefits, and responsibilities" incident to marriage. *Id.* at 2601. It is impermissible for a state to "abridge central precepts of equality" by denying same-sex couples marriage and its attendant benefits. *Id.* at 2604. In illustrating the "constellation of benefits that the

States have linked to marriage," the Court explicitly included birth certificates. Id. At 2601. The Court also indicated that the reasons for its decision went beyond the concrete benefits of marriage: banning same-sex couples from the institution of marriage "works a grave and continuing harm" on same-sex couples that "disrespect[s] and subordinate[s] them." *Id.* at 2604.

Maintaining a different birth certificate regime for children born to married same-sex couples does exactly the same thing. It is precisely the kind of disrespect that cannot be justified under the Fourteenth Amendment because it wrongly denies married same-sex couples the "recognition, stability, and predictability" attendant upon marriage. It also causes instability that different-sex couples "would deem intolerable in their own lives." *Id.* at 2600, 2601, 2604.

As the Chief Justice of the Arkansas Supreme Court observed in his dissenting opinion, "The logical extension of *Obergefell*, mandated by the Due Process Clause and the Equal Protection Clause, is that a married same-sex couple is entitled to a birth certificate on the same basis as an opposite -sex married couple." *Smith v. Pavan*, 2016 Ark. 437, at *23 (2016). Indeed, no "extension" is required: two of the cases on review in *Obergefell* – *Tanco v. Haslam*, 7 F. Supp. 3d 759 (M.D. Tenn. 2014) *aff'd sub nom Obergefell*, 135 S. Ct. 2584 (2015) and *Henry v. Himes*, 14 F. Supp. 3d 1036 (S.D. Ohio 2014) *aff'd sub nom Obergefell*, 135 S. Ct. 2584 (2015) – revolved around equal access to birth certificates. In both cases, state laws precluded same-sex spouses

from being listed as parents on their children's birth certificates. By holding these state laws unconstitutional, *Obergefell* made clear that a state's rules regarding birth certificates, including the universal rule in the United States that spouses be listed on the birth certificate of a child born to a married woman, must be applied equally to all married couples.[17]

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[17] Multiple courts have correctly concluded that *Obergefell* requires states to treat married same-sex couples equally with other couples in the issuance of birth certificates. *See Henderson v. Adams*, 2016 WL 3548645 (S.D. Ind. June 30, 2016) (striking down Indiana's statutory scheme regarding birth certificates); *Marie v. Mosier*, 196 F. Supp. 3d 1202 (D. Kan. Jul. 22, 2016) (permanently enjoining Kansas from treating married same-sex couples differently from married different-sex couples under birth certificate statutes to "ensure that defendants fully comply with *Obergefell*'s broad holding"); *Roe v. Patton*, 2015 WL 4476734 (D. Utah Jul. 22, 2015) (issuing preliminary injunction prohibiting Utah from treating married same-sex couples differently from married different-sex couples under birth certificate statute in view of *Obergefell's* holding that "States must allow same-sex couples to marry 'on the same terms and conditions as opposite-sex couples'"); *Torres v. Seemeyer*, 2016 U.S. Dist. LEXIS 124736, (W.D. Wis. Sept. 14, 2016) (striking down Wisconsin's differential treatment of same-sex couples under the state birth certificate law); *Carson v. Heigel*, No. 3:16-0045-MGL, 2017 U.S. Dist. LEXIS 21104 (D.S.C. Feb. 15, 2017) (issuing declaratory judgment that failure to treat same-sex spouses in the same manner as different-sex spouses in the issuance of birth certificates violates the Fourteenth Amendment and granting summary judgment as to constitutional claims). Allowing the Arkansas ruling to stand otherwise could embolden other jurisdictions to disregard this Court's precedents in *Obergefell* and *Windsor*.

That "*Obergefell* did not address *Arkansas's* statutory framework regarding birth certificates" – the justification cited by the Arkansas Supreme Court (Pet. Br. App. at 11a) – does not give Arkansas license to evade the Court's ruling that the institution of marriage, and all its incident protections and benefits, must be accorded equally to all married couples.

Nor is *Obergefell* the only decision of this Court that the Arkansas ruling contumaciously disregards: the ruling below also contravenes the principles set forth in *United States v. Windsor*, 133 S. Ct. 2675 (2013). In *Windsor*, this Court struck down the Defense of Marriage Act ("DOMA"), a federal statute that denied all federal recognition of the marriages of same-sex couples. The denial deprived the plaintiffs of a host of federal benefits linked to marriage. The Court ruled that depriving married same-sex but not married different-sex couples of such benefits violated "basic due process and equal protection principles." 133 S. Ct. 2675, 2693, 2694 (2013). The Court stressed the "long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State." *Id.* at 2692; *accord Obergefell*, 135 S. Ct. at 2601.

In *Windsor*, the Court found that DOMA's effect was "to identify a subset of state-sanctioned marriages and make them unequal." 133 S. Ct. 2694. Arkansas's birth certificate law does exactly that. It results in the very deprivation of benefits and harm that *Windsor* forbade. By differentiating married same-sex couples from married different-sex

couples, Arkansas relegates same-sex marriages to a lower-tier status and "humiliates tens of thousands of children now being raised by same-sex couples." *Id.* Denying a same-sex parent the automatic right to be listed on her child's birth certificate but affording the right to different-sex parents "makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community ...." *Id.*

Arkansas's assertion that it must capture biological information on its birth certificates is rebutted by its own statutory scheme. As discussed above, in a variety of circumstances, Arkansas lists men who are not genetic parents on a child's birth certificate. This is true even in circumstances, like assisted reproduction, in which all parties know that he is not the child's genetic parent. Arkansas can point to no reason for prioritizing the collection of biological information uniquely for children of same-sex couples when other married couples have children using the same types of medical assistance that many same-sex couples use. Given the unequal application of this asserted interest, Arkansas's action serves only to "to disparage and to injure ...." *Windsor*, 133 S. Ct. at 2696. If Arkansas has an interest in capturing biological information, it can collect that biological information from all families

equally, without relegating some families to second-class status.[18]

Arkansas's unequal treatment of married same-sex couples is unconstitutional. *Amici* respectfully request that the Court grant certiorari to ensure that its precedents are respected. *See, e.g., V.L. v. E.L.*, 136 S. Ct. 1017 (2016) (per curiam) (granting certiorari and reversing Alabama Supreme Court's refusal to recognize adoption by same-sex parent); *Nitro Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) ("The Oklahoma Supreme Court's decision disregards this Court's precedents ...."); *Martinez v. Illinois*, 134 S. Ct. 2070, 2077 (2014) (per curiam) (summarily reversing state court decision that "runs directly counter to our precedents"); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam) (summarily reversing state court decision because it was "both incorrect and inconsistent with clear instruction in the precedents of this Court"); *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) ("It is this Court's prerogative alone to overrule one of its precedents."). Reversal will protect Arkansas children of married same-sex parents from being relegated to legal limbo and second-class status.

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[18] *See, e.g., Culliton v. Beth Isr. Deaconess Med. Ctr.*, 435 Mass. 285, 293-294 (2001) (distinguishing between information listed on a birth certificate, such as the identity of the "parents," and the variety of other information regarding pregnancies and births that registrars can collect and record for public health purposes).

CONCLUSION

For the foregoing reasons *amici* respectfully request that the Court grant the petition for certiorari and reverse the Arkansas Supreme Court.

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